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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PETER KLEIDMAN, Plaintiff and Appellant, v. HILTON & HYLAND REAL ESTATE, INC., et al., Defendants and Respondents.	B285692 (Los Angeles County Super. Ct. No. SC126214)

APPEAL from a judgment and a postjudgment order of the Superior Court of Los Angeles County. Nancy L. Newman, Judge. Judgment affirmed; postjudgment order affirmed in part and reversed in part.

Peter Kleidman, in pro. per., for Plaintiff and Appellant.

Tuchman & Associates, Aviv L. Tuchman and Michael C. Dicecca for Defendants and Respondents.

Appellant Peter Kleidman appeals from both the judgment of dismissal awarding respondents their costs and a postjudgment order granting respondents' second motion for sanctions against him. Kleidman raises a number of arguments on appeal, only a few of which are relevant.

After being prohibited from doing so by the bankruptcy court, Kleidman continued improperly to pursue this action below. He misled respondents to believe he would dismiss the action, which eventually caused respondents to file their demurrer. After Kleidman finally filed a request for dismissal, the trial court awarded costs and sanctions against him. Respondents concede the second sanctions order should be reversed. Nevertheless, it is clear that respondents have prevailed in terminating this action, which Kleidman should have ended when advised to do so by the bankruptcy court. Accordingly, we affirm the judgment but reverse the October 13, 2017 sanctions order. We exercise our discretion in awarding costs to respondents in this appeal.

BACKGROUND

Because the underlying facts are not relevant to this appeal, we do not recite them in any detail here. Suffice it to say, Kleidman brought this state court action (instant action) against respondents when he became dissatisfied with work they performed in connection with his chapter 11 bankruptcy estate (bankruptcy case). As part of the bankruptcy case, Kleidman had employed respondent Hilton & Hyland Real Estate, Inc. (Hilton & Hyland) to sell real property subject to his bankruptcy petition. Respondents Joshua Altman and Matthew Altman worked for Hilton & Hyland. We refer to Hilton & Hyland and the Altmans collectively as respondents.

The United States Bankruptcy Court closed the bankruptcy case in July 2016.

1. Kleidman's Misrepresentation and Unsuccessful Request for Default Against Respondents

In November 2016, Kleidman filed his first amended complaint (complaint) against respondents. In January 2017, however, the bankruptcy court not only reopened the bankruptcy case but also prohibited Kleidman from proceeding against respondents in state court. On January 10, 2017, Kleidman wrote respondents stating he planned to dismiss the instant action. Specifically, Kleidman advised respondents, "I will be dismissing the State Court action [i.e., the instant action] and filing the action in the Bankruptcy Court. You will not need to file your demurrer (or any other responsive pleading)" in the instant action. Kleidman then filed his complaint in bankruptcy court.

However, contrary to his word, Kleidman did not dismiss the instant action. Instead, the day after a response to the complaint was due and without notifying respondents, Kleidman filed a request for entry of default against respondents in the instant action. The next day, the clerk rejected the request for default. Eventually, respondents discovered Kleidman's failed attempt to have their default entered. Immediately upon that discovery, respondents filed a demurrer to the complaint.

2. Kleidman's Voluntary Dismissal of the Instant Action and the Parties' Memoranda of Costs

A few days later, on January 31, 2017, Kleidman filed a request for dismissal of the instant action without prejudice. That same day, the clerk entered the dismissal. The following week, Kleidman filed a notice of entry of dismissal, stating the

instant action "has been dismissed pursuant to [Kleidman]'s request for dismissal." Consequently, respondents each filed a memorandum of costs, which together totaled $1,508.50. Respondents sought costs for filing and motion fees and service of process fees only. A few days later, and despite having voluntarily dismissed the instant action, Kleidman also filed a memorandum of costs.

3. Respondents' First Motion for Sanctions

In early February, and following Kleidman's request for dismissal, respondents filed a motion for sanctions based in part on Kleidman's request for default after having represented to respondents that he would be dismissing the complaint (first motion for sanctions). In June 2017, the trial court granted the first motion for sanctions and awarded $2,510 in sanctions against Kleidman. The court stated Kleidman "appears to accept no responsibility for his blatant misrepresentation to [respondents]." The court determined Kleidman "engaged in bad faith when he represented that he was dismissing the action only to attempt to enter default against [respondents] shortly thereafter."

4. The Parties' Competing Motions to Strike or Tax Costs and Respondents' Second Motion for Sanctions

In late February and early March 2017, and in response to the memoranda of costs, respondents and Kleidman filed competing motions to strike or tax the other's costs. In their motion to strike costs, respondents argued Kleidman was not entitled to costs because he dismissed the complaint and, therefore, they, and not Kleidman, were the prevailing parties. Included in their motion to strike, respondents also moved for

sanctions against Kleidman based on his filing of a memorandum of costs (second motion for sanctions).

In his motion to strike or tax costs, Kleidman argued the trial court clerk erred in January 2017 when it rejected Kleidman's request for default against respondents (filed before he dismissed the complaint). As a result of this alleged clerical error, Kleidman claimed respondents should be "deemed defaulted" as of January 2017 and " 'out of court.' " As a result, Kleidman asserted he was entitled to costs. Alternatively, Kleidman argued Hilton & Hyland's costs for service of process should be struck (because he claimed to have been served only by mail) and its costs for filing and motion fees should be taxed (because he claimed all respondents were defaulted and "out of court" as of January 2017).

5. Kleidman's Unsuccessful Motion for Entry of Default Nunc Pro Tunc

In June 2017, before the hearing on the motions to strike or tax costs and respondents' second motion for sanctions, Kleidman filed a motion for entry of default nunc pro tunc. Kleidman again argued the clerk erred when it rejected his January 2017 request for default. Kleidman claimed the trial court had an affirmative duty to correct the alleged error and must correct the record to reflect respondents were in default as of January 2017. The trial court denied the motion and no default was entered nunc pro tunc or otherwise against respondents.

6. Kleidman's Appeal Challenging the Order Granting First Motion for Sanctions and the Order Denying Default Nunc Pro Tunc

Kleidman filed a notice of appeal from the trial court's order granting respondents' first motion for sanctions and the

court's order denying Kleidman's motion for entry of default nunc pro tunc. (*Kleidman v. Hilton & Hyland Real Estate, Inc.*, B284307 (first appeal).) Before the appellate record was filed, Kleidman voluntarily dismissed the first appeal.

7. Rulings on the Competing Motions to Strike or Tax Costs and Respondents' Second Motion for Sanctions

On August 22, 2017, the trial court held the hearing on the parties' competing motions to strike or tax costs and respondents' second motion for sanctions. At the hearing, the trial court denied Kleidman's motion to strike or tax respondents' costs, granted respondents' motion to strike Kleidman's costs, and granted respondents' second motion for sanctions in the amount of $1,110. The court ordered respondents to prepare and submit a proposed order.

8. Judgment of Dismissal and Award of Respondents' Costs

In August 2017, respondents served on Kleidman and submitted to the trial court a proposed judgment of dismissal. Kleidman did not object to the proposed judgment. On September 28, 2017, and based on Kleidman's voluntary request for dismissal and the clerk's entry of dismissal, the trial court entered a judgment of dismissal (judgment). The judgment awarded costs to respondents in the total amount of $1,508.50. In full, the judgment stated: "Plaintiff Peter Kleidman having filed with the Clerk of this Court a request for entry of dismissal of the entire complaint, and the Clerk having entered the dismissal pursuant to [Kleidman]'s request on January 31, 2017, IT IS ORDERED AND ADJUDGED that this action be and hereby is dismissed without prejudice and that Defendants Hilton & Hyland Real Estate, Inc. is awarded costs in the amount

of $638.50, Defendant Joshua Altman is awarded costs in the amount of $435.00, and Defendant Matthew Altman is awarded costs in the amount of $435.00, all to be paid by [Kleidman]."

9. Instant Appeal

On October 10, 2017, Kleidman filed his notice of appeal from the judgment and the trial court's order granting the second motion for sanctions.[1]

DISCUSSION

1. Costs

a. Default Nunc Pro Tunc

The parties spend an inordinate amount of time addressing the procedural and substantive merit or lack of merit of Kleidman's unsuccessful motion for entry of default nunc pro tunc. Because many of Kleidman's arguments on appeal turn on this issue of default, we address it first.

Kleidman argues the trial court clerk made a clerical error in rejecting his January 2017 request for entry of default. As a result, Kleidman argues not only must the court correct the error, but respondents must be considered to have been in default since January 2017. Thus, the theory goes, having been in default prior to dismissal of the instant action, respondents are neither entitled to their costs nor permitted to oppose Kleidman's memorandum of costs. In response, respondents argue, among other things, that Kleidman dismissed the instant action and,

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[1] The trial court entered its final order on the motions to tax costs and granting the second motion for sanctions on October 13, 2017, i.e., three days after Kleidman filed his notice of appeal. Thus, Kleidman's notice of appeal was premature with respect to that order. Nonetheless, we consider the appeal of that order as having been filed immediately after its entry. (Cal. Rules of Court, rule 8.104(d).)

therefore, cannot seek to correct an earlier order; Kleidman cannot raise the default issue now because he raised it in his first appeal, which he then dismissed; and, in any event, the instant action is not properly before the state courts but rather is only properly before the bankruptcy court.

Putting all other arguments aside, we reject Kleidman's default argument for the simple yet unavoidable reason that, assuming a clerical error was made, it was not prejudicial. Error alone does not require automatic reversal. Rather, we reverse for prejudicial error only. (Cal. Const., art. VI, § 13.) "We will not reverse for error unless it appears reasonably probable that, absent the error, the appellant would have obtained a more favorable result." (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 876; *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 697.) Similarly, we will not remand a case when to do so " 'would be a useless and futile act and would be of no benefit to appellant.' " (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 388.)

Applying these principles here, if the alleged clerical error had not been made, or had been corrected nunc pro tunc and respondents were in fact found in default, they unquestionably would have been entitled to relief from default under either Code of Civil Procedure section 473 or the equitable powers of the court.[2] In relevant part, subdivision (b) of section 473 permits the trial court to relieve a party from any order that was made as a result of that party's mistake or surprise. Similarly, at any time, the trial court may vacate an entry of default on equitable grounds if it was obtained by extrinsic fraud. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) It is undisputed that, prior

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2 Undesignated statutory references are to the Code of Civil Procedure.

to seeking entry of default, Kleidman both represented to respondents he would be dismissing the instant action and advised respondents they need not file a responsive pleading. The trial court already has determined Kleidman acted in bad faith when he said he would dismiss the instant action only to seek respondents' default a short time later. Such conduct plainly would compel relief from default (had it been entered against respondents) under either section 473 or the court's equitable powers. Accordingly, even assuming the clerk erred in rejecting Kleidman's request for default, it was not prejudicial error and not a ground for reversal. Moreover, and again assuming error, to remand this case so that respondents must then move for relief from default only to have the case again dismissed " 'would be a useless and futile act and would be of no benefit to appellant.' " (*People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 388.)

b. Respondents' Memoranda of Costs

The law is clear that, "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) Section 1032 provides that "unless the context clearly requires otherwise," a " '[p]revailing party' " entitled to recover its costs includes "a defendant in whose favor a dismissal is entered." (§ 1032, subd. (a)(4).) Here, the trial court's prevailing party determination was based on its interpretation of section 1032 and its application of that statutory standard to undisputed facts. Accordingly, we review the trial court's prevailing party determination de novo. (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 604.)

Clearly, because Kleidman dismissed his complaint and a dismissal was entered in respondents' favor, the trial court correctly determined respondents were the prevailing parties. (§ 1032, subd. (a)(4); *Santisas v. Goodin* (1998) 17 Cal.4th 599, 609; *Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, 947.) Just as clearly, the trial court correctly held that, as prevailing parties, respondents were entitled to recover their costs. (§ 1032, subd. (b).)

Kleidman disagrees with this analysis. In his view, respondents cannot be the prevailing parties because the "context clearly requires otherwise." Kleidman argues respondents should have been "deemed defaulted" and, had they been, they could not have filed valid or effective memoranda of costs and could not have been the prevailing parties. However, as explained above, we reject this analysis. Accordingly, we find no error in the trial court's order awarding respondents their costs.

Finally, Kleidman argues the trial court abused its discretion when it denied his motion to tax costs and awarded respondent Hilton & Hyland $103.50 in service of process fees and $100 in filing and motions fees for the filing of respondents' January 2017 demurrer. We review the trial court's decision to tax or not to tax costs for an abuse of discretion. "Generally, we review a trial court's order taxing costs for an abuse of discretion. [Citation.] Absent a showing of abuse of discretion, the trial court's allowance or disallowance of costs will not be disturbed on appeal." (*LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1123.)

We find no abuse of discretion here. It was within the trial court's discretion to award Hilton & Hyland its costs for service by messenger, which costs amply were supported by declaration

and documentation. (§ 1033.5, subds. (a), (c).) Similarly, it was within the trial court's discretion to award Hilton & Hyland its costs for filing and scheduling the demurrer in response to the complaint. (§ 1033.5, subd. (a).) Under the circumstances here, it was entirely reasonable for respondents, including Hilton & Hyland, to file the demurrer, the costs of which were also supported by declaration and documentation.

c. Kleidman's Memorandum of Costs

Kleidman also argues the trial court erred when it granted respondents' motion to strike his costs. He again bases this argument on his claim that respondents should have been in default as of January 2017 and, therefore, had no standing to move to strike his memorandum of costs. As explained above, however, Kleidman's default argument lacks merit. Accordingly, we find no error in the trial court's order granting respondents' motion to strike Kleidman's costs.

2. Judgment

Kleidman argues the trial court erred when it entered a judgment of dismissal after he had voluntarily dismissed the instant action. Kleidman argues the judgment is void on its face. In addition, Kleidman insists that, although he dismissed the instant action in January 2017, he was denied due process when the trial court later entered a judgment dismissing the case. Kleidman argues only that portion of the judgment dismissing the instant case is void, but asserts "the portion of the Judgment awarding costs is not void."

We perceive no error in the court's entry of judgment, which references and clearly indicates it is based on Kleidman's own request for dismissal. Other than award costs—which Kleidman claims are not void—the judgment does nothing other

than what Kleidman earlier had requested. In addition, as respondents point out and Kleidman does not dispute, respondents served Kleidman with a copy of the proposed judgment more than one month before its entry. Kleidman filed no objections or other response to the proposed judgment. Moreover, even if there were some error associated with the judgment, Kleidman has not articulated any harm he has suffered as a result. (*In re Jonathan B.*, *supra*, 5 Cal.App.4th at p. 876; *People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 388.)

3. Sanctions

Kleidman argues we must reverse the trial court's October 13, 2017 order granting respondents second motion for sanctions and awarding $1,110 in sanctions against Kleidman. Among other things, Kleidman contends respondents both failed to file their second motion for sanctions separately (but instead included it in their motion to strike costs), and failed to provide Kleidman with the required 21-day safe harbor under either the former or the current version of sections 128.5, subdivision (f), and 128.7, subdivision (c)(1).

Based on new case law issued while this appeal was pending (*Nutrition Distribution, LLC v. Southern SARMs, Inc.* (2018) 20 Cal.App.5th 117), respondents concede their second motion for sanctions was improper "insofar as it was not made separately from their motion to strike costs and did not follow the 21-day safe harbor provision in Section 128.7(c)(1)." In light of respondents' concession and the applicable law, we agree the trial court's order granting the second motion for sanctions should be reversed.

4. Trial Court Rules and Request for Judicial Notice

Kleidman argues we should not base any affirmance of the judgment or orders below either on the lack of a reporter's transcript on appeal or on Kleidman's failure to appear at the trial court hearings. In his reply brief on appeal, Kleidman also urges us to issue a published opinion in which we should "send a message that trial court judges are not permitted to have unpublished courtroom policies and Rule 10.613 and §575.1 are to be enforced. [And we] should not permit [the trial court] to have a courtroom policy generally forbidding telephonic appearances, for such policy contravenes §367.5(a) and Rule 3.670(a), (f)(1)." Kleidman also asks us as a three-justice panel to reconsider his earlier request for judicial notice (seeking judicial notice of the trial court's "unwritten courtroom policy" of "generally forbidding telephonic appearances on law and motion matters"), which our presiding justice denied while this appeal was pending. Respondents do not address these points on appeal.

Because our decision is not based on either the lack of a reporter's transcript or on Kleidman's failure to appear at hearings below, we do not address Kleidman's arguments related to these points.

5. Costs on Appeal

Respondents ask that we exercise our discretion to award them their costs on appeal. Respondents assert this appeal would not have been necessitated were it not for Kleidman's misconduct and frivolous filings below. In response, Kleidman argues strenuously over the course of 11 pages we should not award respondents their costs on appeal. Kleidman insists among other things that he filed the instant case in good faith

and that he made, and continues to make, his default argument in good faith.

We find it significant that to date Kleidman has not acknowledged or addressed the misrepresentation he made to respondents in January 2017, when he unequivocally stated both that he would dismiss the instant action and that respondents need not file a responsive pleading to it. Respondents relied to their detriment on that misrepresentation.

DISPOSITION

The judgment is affirmed. The October 13, 2017 order is reversed to the extent it grants the second motion for sanctions and awards sanctions in the amount of $1,100. In all other respects, the October 13, 2017 order is affirmed. Respondents are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.